

STATE OF MICHIGAN
COURT OF APPEALS

BROOKE POWERS,

Plaintiff-Appellant,

v

RONALD YEH, M.D.,

Defendant-Appellee.

UNPUBLISHED

April 4, 2006

No. 265232

Washtenaw Circuit Court

LC No. 03-000811-NH

BROOKE POWERS,

Plaintiff-Appellant,

v

REGENTS OF THE UNIVERSITY OF
MICHIGAN and UNIVERSITY OF MICHIGAN
HOSPITAL,

Defendants-Appellees.

No. 265280

Court of Claims

LC No. 03-000121-MH

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In docket number 265232, plaintiff Brooke Powers appeals as of right the trial court's grant of summary disposition in favor of defendant Ronald Yeh, M.D. In docket number 265280, plaintiff appeals as of right the court of claims order granting summary disposition in favor of defendants Regents of the University of Michigan and the University of Michigan Hospital. This case stems from plaintiff's receipt of allegedly negligent medical services during a procedure known as a lumbar puncture (spinal tap). We affirm. This case is being decided without oral argument under MCR 7.214 (E).

Plaintiff visited the University of Michigan Medical Center due to a severe and prolonged headache. During her examination, Dr. Yeh performed a lumbar puncture on plaintiff to rule out meningitis. Plaintiff's friend stayed in the room while Dr. Yeh performed the procedure. Plaintiff remembered that she kept her eyes closed during the entire procedure. Sometime during the procedure, a nurse entered the room. Plaintiff testified that just as the nurse opened the door

she experienced severe shooting pain in her back and legs. Neither plaintiff nor her friend observed Dr. Yeh's reaction to this interruption and neither could say whether he was startled or moved the needle.

Plaintiff filed the present medical malpractice action against defendants and alleged that since the procedure she has continuously suffered from severe pain in her back and right hip which limited her ability to function. In the affidavit of merit, plaintiff's medical expert opined that the applicable standard of care was breached because "Dr. Yeh . . . did not anticipate the orderly's startling arrival during the performing of the spinal tap, apparently causing momentary loss of control of this instrumentation." The same expert was deposed and testified that he did not know for a fact whether Dr. Yeh moved the needle during the procedure. He also testified that plaintiff's complaints could have been the result of a properly performed lumbar puncture. Defendants moved for summary disposition under MCR 2.116(C)(10), and the trial court granted the motion, dismissing the case in favor of defendants.

Plaintiff argues that summary disposition was inappropriately granted. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must support its position with affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Once the moving party has met this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). When the burden of proof at trial would rest on the opposing party, the opposing party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts to show that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). Expert testimony is required to demonstrate that the defendant somehow breached the required standard of care. *Id.* at 494. However, an expert's opinion cannot establish malpractice where it is based on assumptions that are not in accord with the established facts. MRE 703; *Wiley, supra* at 495. "Proof of causation requires both cause in fact and proximate cause." *Id.* at 496. "Cause in fact requires that the harmful result would not have come about but for the negligent conduct." *Id.* "The plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 285-286; 602 NW2d 854 (1999), quoting *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). "Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence." *Craig v Oakwood Hosp*, 471 Mich 67, 93; 684 NW2d 296 (2004).

“An explanation that is consistent with known facts but not deducible from them is impermissible conjecture.” *Wiley, supra* at 496.

We conclude that plaintiff failed to establish a *prima facie* case of medical malpractice. Plaintiff’s expert based his conclusion that Dr. Yeh committed malpractice on the belief that “someone entered the room and startled Dr. Yeh.” This assumption cannot be the basis to establish that Dr. Yeh committed malpractice because it is not in accord with the established facts. *Wiley, supra* at 495. Not a single witness observed Dr. Yeh move his instrumentation or appear startled when the nurse entered the room. Plaintiff argues that her testimony that she experienced pain at the exact moment that the nurse entered the room is evidence that Dr. Yeh inappropriately moved the needle and that this is the basis for her expert’s conclusion that Dr. Yeh committed malpractice. However, this assertion appears to be in direct conflict with the expert’s deposition testimony that he did not know for a fact whether Dr. Yeh moved the needle. If pain at that point in the procedure was concrete evidence that Dr. Yeh moved the needle, the expert would not have agreed that he did not “know for a fact that Dr. Yeh was startled to a sufficient degree to have jerked the needle.” Based on the evidence before the trial court, it would have been pure speculation to conclude that Dr. Yeh moved the needle and committed malpractice. Moreover, even if the pain experienced by plaintiff during the procedure is evidence that Dr. Yeh committed malpractice, plaintiff cites no expert testimony to link this event as a cause of her continuing back pain and complications. Both experts testified that plaintiff’s complaints could be the result of a properly performed lumbar puncture. The connection between defendant’s alleged negligent conduct and plaintiff’s injuries is entirely speculative.

Finally, in an affidavit provided to the court after summary disposition, plaintiff’s expert specifically opined that the pain experienced by plaintiff could only be explained by a movement of the needle. This directly contradicts his deposition testimony that he could not tell for a fact whether Dr. Yeh moved the needle. Nonetheless, setting aside the deposition testimony, the expert’s second affidavit still was not based on established facts. The expert opined that needle movement should not be allowed when “removing fluid” and that “there are sometimes during the performance of that procedure where a lumbar puncture injury can happen and other times when it really should not.” However, there is no evidence that Dr. Yeh was “removing fluid” as opposed to some other aspect of the procedure at the time the nurse entered the room. Plaintiff testified that based on Dr. Yeh’s comments to her, she believed that she experienced the pain while Dr. Yeh was filling the second vial with fluid. However, neither witness was watching Dr. Yeh perform the procedure and both witnesses testified that they had no idea how much time passed between the nurse entering the room and when the needle was removed from plaintiff’s back. There is no evidence of exactly what aspect of the procedure Dr. Yeh was performing when plaintiff experienced the pain. Plaintiff’s expert’s apparent conclusion that the pain happened at a time when “it really should not” appears to be based on his assumption that Dr. Yeh was solely engaged in the process of removing fluid. Moreover, as previously noted, both experts testified that plaintiff’s complaints could be the result of a properly performed lumbar puncture. Because plaintiff has not provided expert testimony to link the alleged malpractice as a cause of plaintiff’s continuing complications, the causal connection between defendant’s alleged negligent conduct and plaintiff’s injuries is entirely speculative. Accordingly, the trial court properly granted summary disposition in favor of defendants.

We affirm.

/s/ Janet T. Neff

/s/ Henry William Saad

/s/ Richard A. Bandstra